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4 UNITED STATES DISTRICT COURT  
5 WESTERN DISTRICT OF WASHINGTON  
6 AT SEATTLE

7 BOBBY COLBERT,

8 Petitioner,

9 v.

10 JIM McDONALD,

11 Respondent.

Case No. C08-0870RSL

ORDER GRANTING IN PART  
CERTIFICATE OF APPEALABILITY

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13 This matter comes before the Court on petitioner's "Notice of Appeal from Order  
14 Denying Habeas Proceeding" (Dkt. # 27) which the Court considers a request for a certificate of  
15 appealability under 28 U.S.C. § 2253. Because petitioner filed his notice of appeal after April  
16 24, 1996, his appeal is governed by the Antiterrorism and Effective Death Penalty Act of 1996  
17 ("AEDPA"), which worked substantial changes to the law of habeas corpus. Under the amended  
18 version of 28 U.S.C. § 2253(c), a petitioner may not appeal the denial of a habeas corpus petition  
19 unless the district court or the Ninth Circuit issues a certificate of appealability identifying the  
20 particular issues that may be pursued on appeal. United States v. Asrar, 116 F.3d 1268 (9th Cir.  
21 1997).

22 To obtain a certificate of appealability, the petitioner must make a substantial  
23 showing of the denial of a constitutional right. "Obviously the petitioner need not show that he  
24 should prevail on the merits. He has already failed in that endeavor." Barefoot v. Estelle, 463  
25 U.S. 880, 893 n.4 (1983). Rather, he must demonstrate that the resolution of the habeas petition  
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is debatable among reasonable jurists or that the issues presented were “adequate to deserve encouragement to proceed further.” Slack v. McDaniel, 529 U.S. 473, 483-84 (2000).

Having reviewed the record in this case, including the Report and Recommendation of the Honorable Brian A. Tsuchida, United States Magistrate Judge, the Court finds that the dismissal of petitioner's claim regarding the due process implications of joining unrelated offenses for trial is debatable among reasonable jurists and that claim deserves to proceed further. The misjoinder issue is, therefore, appealable under AEDPA. The Court's findings regarding petitioner's other grounds for review, namely the insufficiency of the evidence to support the second degree rape conviction and the alleged prosecutorial misconduct, are not debatable and should not be the subject of an appeal.

For all of the foregoing reasons, petitioner's request for a certificate of appealability is GRANTED in part and DENIED in part.

Dated this 29th day of May, 2009.

Mr S Casnik

Robert S. Lasnik  
United States District Judge